No. 09-1059

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

ELECTRONIC TRADING GROUP, LLC
On behalf of itself and all others similarly situated,

Petitioner,

—v.—

BANC OF AMERICA SECURITIES LLC, BEAR STEARNS COMPANIES INC., CITIGROUP INC., CREDIT SUISSE (USA) INC., DEUTSCHE BANK SECURITIES INC., GOLDMAN, SACHS & CO., MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, MORGAN STANLEY & CO.

(*Caption continued on inside cover*)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

As to Respondents listed below, the identities of their respective parent corporations, and the identities of any publicly held companies that own 10 percent or more of the identified party's stock are as follows:

Banc of America Securities LLC

Banc of America Securities LLC's sole member is Banc of America Securities Holdings Corporation. Bank of America Corporation is the indirect parent of Banc of America Securities LLC. Bank of America Corporation is a publicly traded company whose shares are traded on the New York Stock Exchange.

The Bear Stearns Companies LLC

JP Morgan Chase & Co. is the parent of The Bear Stearns Companies Inc., now known as The Bear Stearns Companies LLC.

CIBC World Markets Corp.

CIBC World Markets Corp. is an indirect, wholly owned subsidiary of Canadian Imperial Bank of Commerce, a publicly held corporation.

Citigroup Global Markets, Inc. and
Citigroup, Inc.

Citigroup Global Markets, Inc. is 100% owned by Citigroup Financial Products, Inc., which is 100% owned by Citigroup Global Markets Holdings, Inc., which is 100% owned by Citigroup, Inc.

Credit Suisse Securities (USA) LLC and Credit Suisse (USA) Inc.

Credit Suisse Securities (USA) LLC is 100% owned by Credit Suisse (USA) Inc., which is 100% owned by Credit Suisse Holdings (USA) Inc., which is jointly owned by Credit Suisse Group, whose shares are traded on the Swiss Stock Exchange, and Credit Suisse, a wholly owned subsidiary of Credit Suisse Group.

Deutsche Bank Securities Inc.

Deutsche Bank Securities Inc. is 100% owned by DB U.S. Financial Markets Holding Corporation, which is 100% owned by Taunus Corporation, which is 100% owned by Deutsche Bank AG, a publicly held corporation.

Goldman, Sachs & Co., Goldman Sachs Execution & Clearing, L.P.

Goldman, Sachs & Co. and Goldman Sachs Execution & Clearing, L.P. certify that they are subsidiaries of The Goldman Sachs Group, Inc., a publicly traded company, and that, to their knowledge, no other publicly traded company owns 10% or more of either.

The Goldman Sachs Group, Inc.

The Goldman Sachs Group, Inc. certifies that it has no parent corporation and that, to its knowledge, no publicly traded company owns 10% or more of its stock.

Merrill Lynch, Pierce, Fenner & Smith Incorporated

Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc. Bank of America Corporation is a publicly traded company whose shares are traded on the New York Stock Exchange.

Morgan Stanley & Co. Incorporated, Morgan Stanley DW Inc.

Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley, which is a publicly traded company that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, State Street Bank Corporation ("State Street"), State Street Financial Center, One Lincoln Street, Boston, Massachusetts 02111, beneficially owned 11.1% of Morgan Stanley's stock (based on a Schedule 13G filed February 12, 2010 by State Street, (the "State Street Schedule 13G")). As reported in the State Street Schedule 13G, all of the securities are beneficially owned by State Street and its direct or indirect subsidiaries in their various fiduciary and other capacities. As of March 30, 2010, Mitsubishi UFJ Financial Group, Inc. ("MUFG"), 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330 beneficially owns 357,017,088 shares of Common Stock, representing approximately

20.90% of the outstanding shares of Common Stock of the Company (assuming full conversion of all of the shares of Series B Preferred Stock held by MUFG at the Initial Conversion Price and further assuming no conversion of any other securities not beneficially owned by MUFG that are convertible or exchangeable into shares of Common Stock) (based on the Schedule 13D filed on October 23, 2008, as amended on October 30, 2008, May 22, 2009, June 11, 2009 and April 1, 2010 (together, the "MUFG Schedule 13D")). Capitalized terms used and not defined in this description shall have the meanings set forth in the MUFG Schedule 13D.

UBS Financial Services, Inc.

UBS Americas, Inc. is the parent corporation of UBS Financial Services, Inc. UBS Americas, Inc. is a wholly owned subsidiary of UBS A.G. No publicly held corporation owns 10% or more of the stock of UBS A.G.

Van Der Moolen Specialists USA, LLC

Van der Moolen Holding, N.V. indirectly owns 100% of Van der Moolen Specialists USA, LLC.

This Court's recent decision in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), established the framework for determining whether, in a given case, application of the federal antitrust laws is implicitly precluded by the federal securities laws. When it affirmed the dismissal of Petitioner's antitrust claim, the Second Circuit became the first and only court of appeals to have applied *Billing*, and in so doing properly stated and applied this Court's precedent. Since that decision, no conflict among the courts of appeals has arisen, and Petitioner offers no reason that would justify review of the decision below.

The common theme underlying each of Petitioner's reasons for seeking further review is that Petitioner is dissatisfied with the manner in which the Second Circuit applied *Billing* to the "particular facts of this case." Pet. 13. Petitioner's unhappiness with the court of appeals' application of the correct rule of law to the facts of this case does not warrant review by this Court.

STATEMENT OF THE CASE

1. In January 2007, Petitioner Electronic Trading Group, LLC ("ETG") filed a second amended class action complaint against Respondents, which are financial institutions that provide a range of investment banking services, some including prime brokerage and securities lending and clearing services, to short sellers like ETG. Petitioner attacked Respondents' involvement in short selling and securities lending activities for their alleged prime brokerage clients, asserting that Respondents purportedly agreed, in violation of Sherman Act section 1, to fix the borrowing rate

for certain securities that they designated as "hard-to-borrow," to permit "failures to deliver" to occur and to persist, to charge unnecessary "finder's" or "locate" fees in connection with loans of securities, and to engage in other "wrongful conduct." The Complaint also included supplemental state law claims.

2. Applying this Court's decision in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), the district court dismissed Petitioner's Sherman Act claim with prejudice on December 20, 2007. *See* Pet. App. 37a. The district court declined to retain jurisdiction over the state law claims, dismissing them without prejudice. *See id.* 38a.

3. The court of appeals also applied *Billing* and affirmed the district court's dismissal, likewise finding that all four *Billing* considerations weigh in favor of implied preclusion. *See id.* 22a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

Petitioner acknowledges that the "Second Circuit is the first federal court of appeals to interpret *Billing*" and that there is no conflict among the circuits. Pet. 11. This is not surprising: the short period of time that has elapsed since *Billing* has been insufficient to provide an opportunity for other courts of appeals to construe the decision.

Confronted with the lack of disagreement among the courts of appeals on this topic, Petitioner speculates that a decision by the Second Circuit could

have "pervasive nationwide influence" that would be "extremely unfortunate." *Id.* That speculation provides no basis for further review.

II. THE SECOND CIRCUIT PROPERLY APPLIED *BILLING*

Petitioner acknowledges that the court of appeals correctly articulated the *Billing* factors, *see* Pet. 6-7. Petitioner quarrels, however, with the Second Circuit's application of *Billing* to the "particular facts of this case," *see id.* 9, 13. It asserts that "the writ should be granted in this case . . . to make it clear that the SEC['s] regulation of 'failures to deliver' and antitrust prohibitions of price-fixing can and should exist side by side and serve perfectly complementary objectives in the public interest." *Id.* 15.

As an initial matter, even if Petitioner's characterization of the lower court's decision were accurate, which it is not, this Court does not normally grant review "when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioner advances no reason why an exception is warranted here.

Moreover, Petitioner's contention that the Second Circuit misapplied *Billing* to the facts of this case lacks merit. The Second Circuit properly applied *Billing*, holding that (1) short selling is in the "heartland" of securities regulation; (2) there is clear and adequate regulatory authority for the SEC to supervise the role of prime brokers in short selling and the borrowing fees charged by prime brokers; (3) there is evidence of ongoing regulation by the SEC; and (4) there is a conflict

between the antitrust and securities regulatory regimes with respect to the alleged anticompetitive conduct (alleged price fixing with respect to the borrowing fees), in that, among other things, antitrust liability would inhibit conduct that the SEC permits and that assists in the efficient functioning of the short selling market. *See* Pet. App. 11a-21a. Accordingly, the court of appeals correctly concluded that securities law implicitly precludes application of antitrust law to the alleged anticompetitive conduct.[1]

[1] Petitioner complains that "[n]o testimony was adduced with respect to the SEC's practices or intentions," Pet. 5, and suggests that "the writ should be granted to assure that the courts of appeals obtain a factual record and consider the views of government agencies" before reaching a decision under *Billing*, *id.* 11 (capitalization and emphasis altered). Where there is a clear statutory and regulatory framework, the lower courts may appropriately conclude that no further information is needed and grant a motion to dismiss. Neither court below was required to seek further "testimony" or information from any government agency or third party.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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